85-2065

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF FLORIDA,

Petitioner,

v.

RAMON R. PINA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FOURTH DISTRICT

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Attorney General

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48 pp

QUESTION PRESENTED

WHETHER A PROBATIONER MAY INVOKE THE EXCLUSIONARY RULE IN A PROBATION REVOCATION PROCEEDING TO BAR RELEVANT EVIDENCE FROM BEING ADMITTED ON THE GROUND THAT IT WAS SEIZED IN VIOLATION OF THE FOURTH AMENDMENT?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
GROUNDS UPON WHICH JURISDICTION IS INVOKED	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	14

TABLE OF AUTHORITIES

	PAGE
Florida v. Casal, 462 U.S. 637 (1983)	8
Gagnon v. Scarpelli, 411 U.S. 778 (1983)	9,11
Grubbs v. State, 373 So.2d 905 (Fla. 1979)	6
Morrissey v. Brewer, 408 U.S. 471 (1972)	9,10
Pina v. State, 473 So.2d 736 (4th DCA Fla. 1985)	1
I. N. S. v. Lopez-Mendoza, ___ U.S. ___, 104 S. Ct. 3479 (1984)	13
State v. Cross, 11 FLW 193 (Fla. May 1, 1986)	6
State v. Dodd, 419 So.2d 333 (Fla. 1982)	6
United States v. Bazzano, 712 F.2d 826 (3rd Cir. 1983), cert. denied, 465 U.S. 1078 (1984)	11
United States v. Brown, 488 F.2d 94 (5th Cir. 1973)	11

TABLE OF AUTHORITIES
Continued

	PAGE
United States v. California, 414 U.S. 338 (1974)	14
United States v. Farmer, 512 F.2d 160 (6th Cir.), cert. denied, 423 U.S. 987 (1975)	11
United States v. Frederickson, 581 F.2d 711 (8th Cir. 1978)	11
United States v. Janis, 428 U.S. 433 (1976)	14
United States v. Leon, ___ U.S. ___, 104 S. Ct. 3405 (1984)	7,9,11
United States ex rel. Lombardino v. Heyd, 318 F. Supp. 648 (E.D. La. 1970), affirmed 438 F.2d 1027 (5th Cir. 1971)	13
United States v. Winsett, 518 F.2d 51 (9th Cir. 1975)	11
United States v. Workman, 585 F.2d 1205 (4th Cir. 1978)	12

TABLE OF AUTHORITIES
Continued

	PAGE
Article I, Section 12, Florida Constitution	2,5,8
Title 28 U.S.C. §1257(3)	2

OPINIONS BELOW

The decision of the Supreme Court of the State of Florida was rendered on May 1, 1986. It is not yet reported, but it is reproduced in the State's appendix (A 14-16). The opinion of the intermediate appellate court, the Fourth District Court of Appeal, was rendered on June 12, 1985. It is reported as Pina v. State, 473 So.2d 736 (4th DCA Fla. 1985) (A 12-13). The trial court denied the motion to suppress on May 25, 1984, in an unreported order which is set forth in the appendix (A 10-11).

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The opinion of the Supreme Court of Florida was rendered on May 1, 1986.

The jurisdiction of this Court is timely invoked pursuant to the provisions of Title 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated . . .

Article I, Section 12, of the Florida Constitution as amended effective January 4, 1983, provides:

> SECTION 12. Searches and seizures.--The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception

> of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.
>
> (Emphasis added)

STATEMENT OF THE CASE

The Respondent, Ramon R. Pina, was placed on probation in November, 1983, following the entry of guilty

pleas to two counts each of burglary and theft. In January, 1984, he was arrested. The Respondent was charged with violating his two terms of probation by being in possession of cocaine on January 26, 1984, and he was also charged with the substantive offense of trafficking in cocaine on that date.

Through counsel, the Respondent filed a motion to suppress the cocaine found in a search of his luggage at a train station (A 1-19). The trial court ruled that it would not entertain the motion in the probation revocation proceedings, being of the opinion that the evidence would be admissible despite any illegality (A 10-11), in view of the amendment to the Florida Constitution requiring

that the Florida exclusionary rule applies only when the Fourth Amendment's exclusionary rule would. In the substantive case, the trial court denied the motion to suppress.

On appeal, the Fourth District Court of Appeal of Florida reversed, finding the motion to suppress should have been granted. Concerning whether the ruling was applicable to the probation revocation hearing, the court certified the following question to the Supreme Court of Florida as one of great public importance:

> Under the 1983 amendment to article 1, section 12 of the Florida Constitution, does the exclusionary rule apply in probation revocation hearings?

(A 12-13). The Florida Supreme Court answered the question in the

affirmative, thereby approving the decision of the Fourth District. The court cited its opinion in State v. Cross, 11 FLW 193 (Fla. May 1, 1986), decided the same day as the instant case, as controlling.[1] In Cross, the Florida Supreme Court ruled that since this Court has never decided whether the exclusionary rule applies to probation revocation proceedings, it would continue to adhere to its prior case law finding the rule applicable, State v. Dodd, 419 So.2d 333 (Fla. 1982); Grubbs v. State, 373 So.2d 905 (Fla. 1979), despite the fact that these cases were decided prior to the 1983 state constitutional amendment.

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[1] Cross is unreported; it is set forth in full in the appendix (A 17-26).

REASONS FOR GRANTING THE WRIT

This Court, in United States v. Leon, ___ U.S. ___, 104 S. Ct. 3405 (1984), has unequivocally held that the exclusionary rule is not constitutionally required by the Fourth Amendment, but rather it is a judicial remedy designed to curtail police misconduct. Application of the exclusionary rule is determined by weighing the costs and benefits of its use in a given situation.

Although urged to engage in such a cost/benefit analysis by the State, the Florida Supreme Court declined to determine whether, under the Fourth Amendment, the state courts should apply the exclusionary rule in probation revocation proceedings.

This decision is directly contrary to the 1983 amendment to Article I, Section 12, of the Florida Constitution, which directs that only evidence inadmissible under the Fourth Amendment, as construed by this Court, is inadmissible in judicial proceedings in Florida. As noted by Chief Justice Burger, concurring in Florida v. Casal, 462 U.S. 637, 638 (1983), "that section ensures that the Florida courts will no longer be able to rely on the state Constitution to suppress evidence that would be admissible under the decisions of the Supreme Court of the United States."

While this Court has never specifically held the exclusionary rule inapplicable to probation revocation proceedings, it has held

a probationer in a probation revocation proceeding is not entitled to the full panoply of rights guaranteed a defendant in a criminal trial. Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1983). Considering the present issue in light of the weighing process directed by United States v. Leon, supra, the State submits the deterrence rationale underlying the exclusionary rule is adequately served by excluding any illegally-seized evidence from the substantive criminal prosecution, while permitting its use in the probation revocation proceeding. This approach fairly balances the rights of probationers and society's interest in justice. It provides that no one will not have evidence seized

in contravention of the Fourth Amendment used against him in a substantive criminal trial, while at the same time ensuring that a probationer who has been given by judicial grace an opportunity to live at liberty, cannot continue on probation if he flouts the law.

The Florida Supreme Court, by declining to apply Fourth Amendment analysis in its disposition of the instant case, has decided a substantial federal question which has not yet been resolved by this Court. The result reached by the Florida Supreme Court--the exclusion of illegally-seized evidence in a probation revocation proceeding--is incorrect in light of the principles discussed in Morrissey v. Brewer,

Gagnon v. Scarpelli and United States v. Leon, supra. Therefore, this case should be accepted for review.

Moreover, although the majority of federal courts which have considered the issue have ruled the exclusionary rule inapplicable to probation revocation hearings, at least one court has concluded the rule does apply. See United States v. Bazzano, 712 F.2d 826 (3rd Cir. 1983), cert. denied, 465 U.S. 1078 (1984); United States v. Frederickson, 581 F.2d 711 (8th Cir. 1978); United States v. Winsett, 518 F.2d 51 (9th Cir. 1975); United States v. Farmer, 512 F.2d 160 (6th Cir.), cert. denied, 423 U.S. 987 (1975); United States v. Brown, 488 F.2d 94 (5th Cir. 1973); but see

United States v. Workman, 585 F.2d 1205 (4th Cir. 1978).

Thus, the Florida Supreme Court has decided a federal question in a manner which conflicts with the way a majority of the Circuit Courts of Appeal have ruled on the issue.

The federal question presented in this case is an important and substantial issue. Its resolution by this Court will settle a question on which the state and federal courts are divided. A decision by this Court will control all future probation revocation proceedings in which a probationer, charged with violating the terms of his probation, contends that evidence relevant to proving the charged violation was illegally

seized and so inadmissible. It is the State's position that judges, both federal and state, who are charged with the responsibility of granting and/or revoking probation, are entitled to be fully aware of the circumstances of any violation. Double application of the exclusionary rule to both the substantive offense and a probation revocation proceeding undermines the effectiveness of probation. United States ex rel. Lombardino v. Heyd, 318 F. Supp. 648 (E.D. La. 1970), affirmed 438 F.2d 1027 (5th Cir. 1971).

This Court has, in past cases, held the exclusionary rule does not apply in all judicial proceedings. I. N. S. v. Lopez-Mendoza, ___ U.S. ___, 104 S. Ct. 3479 (1984) [civil

deportation proceedings]; United States v. Janis, 428 U.S. 433 (1976) [federal civil tax assessment proceedings]; United States v. California, 414 U.S. 338 (1974) [grand jury proceedings]. The issue presented in this case is equally as important as in the foregoing cases, for it will have far-reaching effect. The State urges this Court to grant certiorari review.

CONCLUSION

The Petitioner has sought to present to this Court a substantial basis upon which to conclude that the applicability vel non of the exclusionary rule to probation revocation proceedings is an issue worthy of being addressed by the

United States Supreme Court. There is a solid jurisdictional basis predicated upon (1) the fact that the Florida Supreme Court decided a substantial federal question not previously determined by this Court; and (2) a conflict between the opinion under review and the majority of the federal courts of appeal. On this basis, the Petitioner submits that the instant Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel of Record for Petitioner

APPENDIX

IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY,
FLORIDA

CASE NO.: 84-962CF and all violations of probation

JUDGE: MARK SPEISER

STATE OF FLORIDA,

Plaintiff,

vs.

RAMON RICARDO PINA,

Defendant.
_____/

MOTION TO SUPPRESS

COMES NOW the Defendant, RAMON RICARDO PINA, by and through his undersigned attorney and moves this Honorable Court to suppress the evidence in the above-styled cause and would state:

FACTS

On January 26, 1984, RAMON RICARDO PINA was arrested at the train station in Fort Lauderdale. The Defendant allegedly was possessing cocaine in the approximate amount of ONE HUNDRED AND TEN GRAMS (110). The arrest that occurred at the train station was allegedly as a result of a consensual search based upon an initial stop by Detectives Green, Nutt and Gaffney of the Broward Sheriff's Office on a drug courier profile.

The Defendant was approached by Detectives Green and Nutt and told that they were police officers attempting to stem the tide of drug traffic in the South Florida area. After exchange of certain information

and identification, Detective Nutt asked the Defendant whether they could look in his bags. The Defendant will indicate that only after a threat was made to obtain drug sniffing dogs and a refusal to allow him to leave the area under his own power, did he succumb to the request of the police officers.

Ultimately a search of the Defendant's possessions was done. The search requested for was termed a "hand check." The Detectives opened the Defendant's bags, finding two tennis cans that were apparently sealed. After shaking the two (2) tennis cans they went further by unscrewing the bottom portion of the cans and locating a white powdery substance. The Defendant was

arrested and charged with the offense of trafficking in cocaine.

1. The Defendant did not in any legal standard, consensually agree to allow the police officers requesting the consent to search his bags. This consensual search must exist in order for the Court to find that the search of the Defendant's belongings was permissible under the law. See Florida v. Mark Royer, 75 L.Ed. 2nd 229, decided March 23, 1983.

2. The explanation to the Defendant by the police officers that should he choose not to co-operate with them, that a drug sniffing dog would be obtained in order to determine whether there was grounds to prepare and get granted a

search warrant wherein probable cause was required, unlawfully tainted the momentary encounter that the Detectives were making. This momentary encounter when caused to be less than consensual and less than momentary was obviated by the necessities of the police officers to "threaten" the Defendant into submitting to their desires. See United States v. Raymond J. Place, 77 L.Ed. 2nd 110, decided June 20, 1983.

3. The Detective requested that the law enforcement officers be allowed to make what was termed a "hand check." This "hand check" which was ultimately succumbed to, was defined by the police officer in his deposition at page 19, line 1,

"hand check, open the bag and look inside, see what's there, close up the bag." This initial explanation was followed by a further description of what a "hand check" was supposed to be in sentences that followed in the deposition. However, it should be noted that what this "hand check" was suppose to be was never explained to the Defendant, only the term "hand check." The Defendant's belief that the officers wanted to look into his bag and nothing more was obviously violated by the ultimate search that occurred. This search that occurred was in direct conflict with the belief that the officers were "hand checking" the items. See Horvitz v. State, 4th DCA 433 So.2d 545.

4. It was contemplated by Agent Joseph Nutt that if the Defendant was objecting to the search and explaining that harassment was occurring that the officer would have let him alone. And let him leave. See page 9 of deposition, line 20 and succeeding lines. This was also confirmed by Detective Richard Green's deposition when he indicated that he told the Defendant that he "had a right to refuse and he should stop yelling and being upset because he could leave any time that he wanted." See page 18, line 5 and succeeding sentences on deposition. Obviously, if it was necessary to discuss these points with the Defendant, it was clear that the

Defendant did not want to be where he was and that any type of search would have been tainted at that point.

5. The Defendant seeks to suppress the seizure of cocaine that was made without a search warrant as a result of an unlawful and illegal seizure. Unlawful and illegal because it was done without consent.

6. Other grounds to be argued ore tenus.

WHEREFORE, the Defendant, RAMON RICARDO PINA, by and through his undersigned attorney, moves this Honorable Court to suppress the cocaine in the above-styled cause.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to:

Assistant State Attorney, Janice Law, Broward County Courthouse, 201 S.E. Sixth Street, Fort Lauderdale, Florida 33301, on the 17th day of May, 1984.

DELL & SCHAEFER, P.A.
Attorneys for Defendant
500 Center Court Building
2450 Hollywood Boulevard
Hollywood, Florida 33020
Phone: 920-7932

BY: /s/ Dennis L. Schaefer
DENNIS L. SCHAEFER

THE COURT: No. What I'm going to do, I'm going to rule that Lavensolo (sic) provides, with respect to motions to suppress, they are inapplicable with respect to probation revocation hearings that take place after the effective date of the amendment to the Florida Constitution.

The amendment to the Florida Constitution was January 4, 1983. The warrant for violation of probation was dated February 17, 1984, and the - not only is the warrant dated after the effective date of the amendment to the Florida Constitution, but also the act that constitutes the basis for violating his probation took place after the Florida Constitution was amended.

The act allegedly took place

January 26, 1984. The probation violation warrant was dated February 17, 1984. So I'm going to rule it's my opinion that the controlling date is the date that the probation revocation was filed.

MR. SCHAEFER: Okay. My objection is noted for the record.

THE COURT: I'm going to rule the motion to suppress is inapplicable to the probation violation, so the motion to suppress we are embarking on, then, is only applicable to the substantive case, 84-962.

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT JANUARY TERM 1985

RAMON R. PINA,	)	
	)	
Appellant,	)	CASE NOS.
	)	84-1487,
v.	)	84-1488 and
	)	84-1489
STATE OF FLORIDA,	)	
	)	
Appellee.	)	

Opinion filed June 12, 1985

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.

Consolidated appeals from the Circuit Court for Broward County; Mark A. Speiser, Judge.

Richard L. Jorandby, Public Defender, and Thomas F. Ball, III, Assistant Public Defender, West Palm Beach, for appellant.

Jim Smith, Attorney General, Tallahassee, and Joan Fowler Rossin, Assistant Attorney General, West Palm Beach, for appellee.

PER CURIAM.

We reverse the appellant's convictions and sentences on the authority of Horvitz v. State, 433 So.2d 545 (Fla. 4th DCA 1983) and Tamer v. State, 463 So.2d 1236 (Fla. 4th DCA 1985). The trial court erred in failing to grant the motion to suppress. We also certify the following question posed in Tamer as one of great public importance:

> Under the 1983 amendment to article 1, section 12 of the Florida Constitution, does the exclusionary rule apply in probation revocation hearings?

Accordingly, this cause is reversed and remanded for further proceedings in accord herewith.

ANSTEAD, C.J., HURLEY, J., and SALMON, MICHAEL H., Associate Judge, concur.

SUPREME COURT OF FLORIDA

No. 67,280

STATE OF FLORIDA, Petitioner,

vs.

RAMON PINA, Respondent.

[May 1, 1986]

SHAW, J.

We grant the petition for review in this case under article V, section 3(b)(4) of the Florida Constitution. The district court certified the following question to be of great public importance:

> Under the 1983 amendment to article I, section 12 of the Florida Constitution, does the exclusionary rule apply in probation revocation hearings?

Pina v. State, 473 So.2d 736 (Fla. 2d DCA 1985).

We answered the certified question herein in the affirmative in State v. Cross, No. 67,137 (Fla. May 1, 1986), and approve the decision below on the authority of Cross.

It is so ordered.

BOYD, C.J., and ADKINS, OVERTON, McDONALD, EHRLICH and BARKETT, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Fourth District - Case Nos. 84-1487, 84-1488 & 84-1489

Jim Smith, Attorney General and Joan Fowler Rossin, Assistant Attorney General, West Palm Beach, Florida,

for Petitioner

Richard L. Jorandby, Public Defender
and Thomas F. Ball, III, Assistant
Public Defender, Fifteenth Judicial
Circuit, West Palm Beach, Florida,

for Respondent

STATE OF FLORIDA, Petitioner, vs. KEVIN RICHARD CROSS, Respondent. Supreme Court of Florida, Case No. 67,137. May 1, 1986. Application for Review of the Decision of the District Court of Appeal--Certified Great Public Importance. Second District--Case No. 84-2688. Jim Smith, Attorney General and Katherine V. Blanco, Assistant Attorney General, Tampa, Florida, for Petitioner. James Marion Moorman, Public Defender and Joel E. Grigsby, Assistant Public Defender, Tenth Judicial Circuit, Bartow, Florida, for Respondent.

(PER CURIAM.) We have before us by petition for review Cross v. State, 469 So.2d 226 (Fla. 2d DCA 1985), wherein the district court certified a question of great public importance. We have jurisdiction under article V, section 3(b)(4), Florida Constitution.

The facts surrounding respondent Cross's revocation of probation are recounted in the district court's opinion. It is sufficient for the purpose of addressing the certified

question to note that the district court reversed the trial court's order, finding erroneous its conclusion that the nonconsensual warrantless search of Cross's home came within the emergency doctrine exception to the warrant requirement. The district court, having concluded that Cross's probation was revoked based on illegally obtained evidence, then addressed the inadmissibility of such evidence in a probation revocation proceeding and certified the following question:

> WHETHER AMENDED ARTICLE 1, SECTION 12, OF THE FLORIDA CONSTITUTION PROHIBITS ILLEGALLY OBTAINED ARTICLES AND INFORMATION FROM BEING ADMITTED IN EVIDENCE IN PROBATION REVOCATION PROCEEDINGS?

Id. at 228.

We agree with the district court's conclusion that the evidence in this case was illegally seized. The state does not challenge this holding, but argues that amended article 1, section 12, Florida Constitution, effective January 4, 1983, renders the exclusionary rule no longer applicable in probation revocation proceedings in Florida. Prior to the amendment, we held that the exclusionary rule did apply in probation revocation proceedings. State v. Dodd, 419 So.2d 333 (Fla. 1982); Grubbs v. State, 373 So.2d 905 (Fla. 1979). The amended section, with new language underlined, reads as follows:

SECTION 12. Searches and seizures.--The right

of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

The state urges that the rationale of our previous cases, this Court's conclusion that the Florida constitutional proscription against unreasonable searches and seizures is more restrictive than its federal counterpart, no longer has any constitutional basis under the amendment. The state concedes that no United States Supreme Court decision specifically holds the exclusionary rule inapplicable to probation revocation proceedings. It points out, however, that a probationer in a probation revocation proceeding is not entitled to the full panoply of rights guaranteed to a defendant in a criminal proceeding. Gagnon v. Scarpelli, 411 U.S. 778 (1973). The state

argues that as the exclusionary rule is not constitutionally required, but rather is a judicial remedy designed to curtail police misconduct, e.g., United States v. Leon, 104 S. Ct. 3430 (1984), its remedy is adequately served by excluding illegally seized evidence from substantive criminal prosecutions, while permitting its use in probation revocation hearings. The state suggests that we should hold the exclusionary rule inapplicable in these latter proceedings in conformity with the majority of federal circuits. See United States v. Bazzano, 712 F.2d 826 (3d Cir. 1983), cert. denied, 465 U.S. 1078 (1984); United States v. Frederickson, 581 F.2d 711 (8th Cir. 1978); United States v. Winsett, 518 F.2d 51

(9th Cir. 1975); United States v. Farmer, 512 F.2d 160 (6th Cir.), cert. denied, 423 U.S. 987 (1975); United States v. Brown, 488 F.2d 94 (5th Cir. 1973); but see United States v. Workman, 585 F.2d 1205 (4th Cir. 1978). The state also contends that this Court implicitly recognized that under the amendment the exclusionary rule does not apply to probation revocation proceedings. State v. Lavazzoli, 434 So.2d 321 (Fla. 1983).

Regarding Lavazzoli, respondent correctly points out that it was decided on the narrow question of whether the amendment would apply to that pending case. Lavazzoli does not compel the result for which the state argues here.

Respondent argues that our holding in Dodd should control unless the amendment affirmatively negates Dodd, and that the amendment refers not to a majority of federal law, but rather only to United States Supreme Court decisions as controlling. Respondent cites Lavazzoli:

> When faced with constitutional amendments not clearly expressing an intent to the contrary, this Court has repeatedly refused to construe the amendment to affect detrimentally the substantive rights of persons arising under the prior law.

Id. at 324.

The United States Supreme Court has not ruled on the issue presently before us. Therefore, it is not necessary to interpret the amendment to article I, section 12.

We approve the decision of the district court on the authority of Dodd which is still the controlling state law.

It is so ordered. (BOYD, C.J., and ADKINS, McDONALD, EHRLICH, SHAW and BARKETT, JJ., Concur. OVERTON, J., Concurs specially with an opinion.)

(OVERTON, J., specially concurring.) I fully concur. In answering the certified question in this cause, it should be understood that this opinion has not changed the principle we established in Grubbs v. State, 373 So.2d 905 (Fla. 1979), that a probationer's constitutional rights are more limited than an ordinary citizen's. In Grubbs, in considering the reasonableness of a search of a

probationer, this Court expressly held that the status of a probationer is different from that of an ordinary person; that a probationer is subject to certain restrictions on his living in open society; that, to protect the public, a probation supervisor must be allowed the necessary authority to supervise the probationer, including the search of a probationer's person or residence without warrant; and that such a search is a reasonable search under the state and federal constitutions.